



DALLAS COUNTY

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March 6, 1991

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Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711-2548

Opinion Committee

Re: Authority of a County Hospital
District to Expend Public Funds
for Individual or District
Memberships in Non-profit
Corporations and/or Associations

Dear General Morales:

On behalf of the Dallas County Hospital District, we respectfully request an Attorney General's Opinion concerning the authority of a county hospital district to expend hospital district public funds for the district to become a dues paying member of private non-profit corporations and/or associations or to use hospital district funds to reimburse hospital district officials for similar expenses for individual memberships.

The issue to be decided is if a county-wide hospital district established under Article IX § 4 of the Texas Constitution and former Article 4494n (now § 281.001 et seq., Health & Safety Code) may legally expend hospital district funds to become a dues paying member of private non-profit corporations and/or associations. More specifically, the organizations under consideration are three chambers of commerce; an organization which publicizes the availability of health care facilities in the county, both public and private; a business promotion association; an association to promote economic growth; and an association to encourage the involvement of the local business community in matters affecting the quality of life and government in the county. The proposed county involvement ranges from paying membership fees and dues for the hospital district itself to reimbursing hospital district officials for similar expenses for individual memberships. The Dallas County Hospital District has requested an opinion regarding its ability to join organizations which it believes generally involve promotion of the hospital district to attract paying patients, the improvement of the neighborhood in which Parkland Memorial Hospital is located in order to attract patients and improve the quality of care rendered, general economic development and the reimbursement of expenses incurred by the president and

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chief executive officer of the hospital district. The hospital district's board of managers has determined all of the proposed expenditures to be in the public interest. Five specific questions are presented in connection with this request. They are:

1. May the Dallas County Hospital District be a dues paying member of Dallas Medical Resource, a Texas non-profit corporation formed to provide services to member institutions such as publicizing the quality, availability and diversity of health care services available at member health care facilities located in Dallas County?

2. May the Dallas County Hospital District be a dues paying member of the Stemmons Corridor Business Association, an association organized to improve the quality and safety of the Stemmons Freeway a business corridor in which Parkland Memorial Hospital is located?

3. May the Dallas County Hospital District be a dues paying member of the Greater Dallas Chamber of Commerce, the Dallas Black Chamber of Commerce and the Dallas Hispanic Chamber of Commerce?

4. May the Dallas County Hospital District reimburse its president and chief executive officer for his expenses in joining and maintaining his membership in the Dallas Assembly, an association of individual citizens whose goal it is to create growth through ideas; or, may the Dallas County Hospital District pay his expenses incurred in joining and maintaining membership in the Dallas Assembly?

5. May the Dallas County Hospital District reimburse its president and chief executive officer for his expenses in joining and maintaining his membership in the Dallas Citizens Council, a Texas non-profit corporation organized to encourage the involvement of the local business community in matters affecting the quality of life and governance of the greater Dallas community, to formulate procedures and channels for such improvement and to provide mechanisms for the

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adoption and implementation of programs which develop from such involvement; or, may the Dallas County Hospital District pay his expenses incurred in joining and maintaining his membership in the Dallas Citizens Council?

Our research indicates there is authority in Texas both for and against the proposed expenditures which form the basis of this opinion request. While the greater weight of authority and the better reasoned cases appear to indicate that the questions should be answered in the negative, there are some arguments to the contrary. Both opposing and supporting authority are set out below, and this office respectfully requests an Attorney General's Opinion regarding the proposed questions.

Article IX § 4 of the Texas Constitution provides that the legislature may authorize the creation of county-wide hospital districts having populations in excess of 190,000. Bonds may be issued for the acquisition, construction and maintenance of any county-owned hospital. Such a hospital district has the full responsibility for providing medical and hospital care to the needy inhabitants of the county. Article IX § 4 goes on to specify the funding and taxation authorized to support hospital districts.

The enabling legislation, former art. 4494n, Texas Revised Civil Statutes (now Health and Safety Code § 281.002 et seq.) at § 13 (now Health and Safety Code §§ 28 281.045 and 281.046) provides that the hospital district assumes full responsibility for furnishing medical and hospital care for indigent and needy persons residing in the district once it is established and taxes are collected.

The use of county funds by, or in connection with, county hospital districts has been discussed by courts and the Texas Attorney General's Office from 1940 until the present and has been addressed through several statutes. The case most directly in point is Bexar Hospital District v. Crosby, 327 S.W.2d 445, (Tex. 1959). The case concerned a dispute between the county and the hospital district regarding which entity was entitled to custody and control of delinquent taxes levied to finance hospitals taken over by the hospital district and also the custody and control of certain sinking funds used to retire the bonded indebtedness. In reaching its decision, the Texas Supreme Court found it necessary to construe Article III §§ 51 and 52 of the Texas Constitution. Section 51 forbids the legislature to authorize the application of public monies to any association of individuals or municipal or other corporations whatsoever. Section 52 states that the legislature cannot authorize a city, county, town or other political corporation or subdivision of the state to extend public

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monies or credit to any individual, association or corporation whatsoever or to become a stockholder in such corporation, association or company. In short, the Supreme Court made it clear that the legislature cannot expend or authorize a city or county to expend public money to any association or corporation. Since a hospital district is a subdivision of the state, it should be controlled by these sections and this decision.

A different result may be reached if it is presumed that the prohibitions under §§ 51 and 52 pertain only to the corporation-stockholder situation. Under that reasoning, the question to be decided is whether becoming a dues paying member of a Texas non-profit corporation is the equivalent of becoming a stockholder. It seems clear that for a hospital district to become a member of one of the proposed associations would not be the equivalent of becoming a stockholder as that relationship implies an ownership interest in the corporation. This line of reasoning relies upon the beginnings of Article III §§ 50-52 being in the mid 19th Century Railway Bond era. Private capital was not readily available, and state and local governments offered financial assistance to attract railroads. The assistance usually took the form of stock or security purchases, co-signatures on bonds or outright gifts or donations. Many of the ventures proved disastrous, because many of the railroads failed as a result of mismanagement, inefficiency or deceit and never materialized or subsequently failed after short periods of operation. The cities and towns were left obligated on the bond debt and the citizens were taxed in instances in which they received no benefit. In order to prevent this type of event from occurring in the future, prohibitions were adopted limiting such activity. One of these may have been Article III § 52 of the Texas Constitution.

This line of reasoning goes on to suggest that the proposed actions by the hospital district do not contain the financial risk or liability which Article III §§ 50-52 are designed to prevent. The Texas Non-Profit Corporation Act, art. 1396-2.08(e) states that the members of a non-profit corporation shall not be personally liability for the debts, liabilities or obligations of the corporation. The conclusion is that the county should not be exposed to financial risk if the operation of the non-profit corporation is limited as provided by statute. Furthermore, the county should be further insulated from financial liability if an officer of the hospital district were to hold a seat on the boards of directors of each of the organizations in which membership is proposed.

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One critical matter which must be addressed in resolving this problem is to determine the exact nature of the proposed expenditures. While some county expenditures might be permitted, the Texas Supreme Court explained in Board of Managers of the Harris County Hospital District v. Pension Board of the Pension System for the City of Houston, 449 S.W.2d 33 (Tex. 1969) that each transaction must be analyzed on its own merits. In the Board of Managers case, there was an attempt to compel the transfer of contributions to a city pension fund from the city to the hospital district after the city employees were transferred to the district. The Court held that the pension contributions did not amount to a proscribed use of public funds as they were earmarked and could be used only for the purpose intended. A further discussion of this issue is came in the decision of State of Texas ex rel. Grimes County Taxpayers Association, et al. v. Texas Municipal Power Agency, et al., 565 S.W.2d 258, (Tex. Civ. App.-Houston 1978, no writ). There, one government agency paid another agency for electrical power. Services were provided for the payments, so these were not proscribed expenditures. Accordingly, they were not in conflict with Article III § 52.

While certain expenditures are prohibited for counties, Texas law traditionally has permitted counties to contract for services they could not otherwise provide themselves. A Texas county does not have unbridled authority with respect to indigents or public health, but a county may contract with a private corporation to perform services it is authorized to perform itself. Without such authority, an expenditure is a donation in violation of the Constitution. Even if an expenditure is authorized, the county must receive an adequate consideration such as a public benefit or a service the county has a duty to provide. Also, the contract must have a public purpose. Attorney General Opinion JM-65 (1983). Furthermore, a Texas Attorney General's Opinion has ruled that a county may contract with a chamber of commerce if the county receives adequate consideration as well as adequate assurance that the public purpose may be accomplished. Paying dues to a private corporation such as a chamber of commerce in order to secure "general benefits resulting from encouragement of private industry and business" is not sufficiently "insulated from the abuses" that Article III § 52 was designed to prevent. Attorney General Opinion JM-716 (1987). These opinions specifically stated that such conduct is permitted only if it is for services the county otherwise could provide for itself and if the county receives adequate consideration and adequate assurance of the accomplishment of public purposes. A county does not have unbridled authority, however, even in areas where it may have some authority to act. Attorney General Opinion JM-65 (1983). While it may be argued both ways whether one of the proposed organizations can give adequate consideration and promise that public purposes will **be**

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accomplished, it should be noted that the cases where expenditures were approved have dealt with the transfer of some valuable physical asset to the benefit of the county when the contract was made.

The argument in favor of the hospital district's proposed expenditures is that the district could certainly contract with the respective non-profit corporations to provide the services that they received by being a member. Of course, some form of continuing public control is necessary to insure that the state agency receive its consideration and that the public purpose is accomplished. Brazoria County, et al., v. Perry, 537 S.W.2d 89, (Tex. Civ. App.-Houston 1976, no writ) has been cited for the proposition that the purpose of the constitutional provision referring to Article III § 52 is to prevent the gratuitous application of public funds to private use. The argument goes on to state that such would not be the case in the proposed transactions since such expenditures would be used for a public purpose which would be permissible if done directly by the governmental unit and where necessary oversight and financial obligation on the part of the district would be provided. It is possible that Perry can be distinguished, because that case concerned the loan of credit to an individual person who was a county employee at the time of the loan. Furthermore, the county was complying with a statutory requirement for the training of law enforcement officers. The Dallas County Hospital District has no such requirement for becoming a member of a chamber of commerce or related organization.

Texas Constitution Article XI § 3 has been cited as a prohibition against a local governmental entity making any kind of donation to a private corporation or association. In Section 3, counties are forbidden from making any appropriation or donation to a private corporation or association or subscribing to the capital of any such organization. The question here is whether or not Article XI § 3 applies to hospital districts. This provision is found in the portion of the constitution pertaining to municipal corporations. There is no question that the Dallas County Hospital District is not a part of a city, but it is an independent legal entity in relation to the State of Texas organized under a county. Laje v. R. E. Thomason General Hospital, 665 F.2d 724 (5th Cir., 1982).

While direct authority may be cited for rules which may be applicable to the posed questions, traditional rules of legal interpretation teach that legislative intentions may be detected by the absence of comment or attention where such law might logically be thought to be found. Local Government Code § 81.026 addresses the powers of the commissioners court in regards to a "state

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association of counties." The commissioners court is permitted by § 81.026 to spend money from the county's general fund for membership fees and dues to a non-profit state association of counties. By applying the interpretative maxim "expressio unius est exclusio alterius", it seems clear that no similar expenditure was intended to be authorized. This is also consistent with Article III §§ 51 and 52 as construed by the Supreme Court in Bexar Hospital District v. Crosby.

Another question to be considered is if the proposed actions violate the prohibition against the lending of public credit. Texas courts, according to one line of reasoning, have held that an expenditure that indirectly benefits a private person or corporation if made for the direct accomplishment of a legitimate public purpose is not impermissible. The decision in Brazoria County v. Perry is cited for this proposition. In our particular instance, the decision of the Board of Managers of the Dallas County Hospital District would be the determination of what is a public purpose.

The question of whether or not there has been an impermissible donation of public credit or money was addressed in the May 1975 issue of the "Texas Bar Journal" at page 413. That article suggests a four point test determining whether or not there has been appropriate use of public credit and money. In order for the use of money and credit to be permissible, it must: (1) have an accomplishment of the public purpose as the predominate purpose of the transaction; (2) have sufficient assurance through contractual or statutory obligations or through continuing supervision of the political subdivision that the public purpose will be accomplished; (3) have sufficient protection of the handling of the public money; and, (4) there must be adequate consideration passing to the political subdivision. The argument in favor of the hospital district that the proposed expenditures meet this four point test reasons that (1) there is legitimate accomplishment of the public purposes as applied to the various non-profit corporations, (2) contractual obligations bind the non-profit corporations and provide services to the hospital districts, (3) protection and handling of public money is accomplished by the lack of liability of the hospital district for the obligations of the non-profit corporations and the hospital district's appointment of a member of the board of directors and (4) that consideration is also adequate as there is no indication that the services are for less than fair market value and the services being provided could be directly contracted for by the hospital district without violating the constitutional provisions of Article III § 52(a). The opposing view is that the promotion of commerce is not a public purpose of the hospital district; that there is no assurance through a contractual or statutory obligations or through continuing

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supervision of the political subdivision merely by having a hospital district official on the board of the subject organizations; that there is no guaranteed protection of the handling of public money; and that there is no certain consideration passing to the hospital district as a result of membership in the subject organizations.

As early as 1940, the Texas Attorney General has addressed the question of expenditures of county monies to private organizations. The Attorney General always has reached a result forbidding such actions. Attorney General Opinions 0-2629 (1940) and 0-5563 (1943) concerned contributions to charitable institutions. In both instances, these were found to be in violation of Texas law. Attorney General Opinion 0-6168 (1945) concerned the constitutionality of levying a tax for the support and maintenance of a county board of development, a chamber of commerce or similar organization devoted to the growth, advertisement, development and improvement of cities or towns. Such use of the taxing power was found to be unlawful. A use of county funds donated for the purpose of building a privately chartered cooperative hospital within the county was found to be improper in Attorney General Opinion 0-7197 (1946). A similar opinion was expressed in Attorney General Opinion H-31 (1973) where it was found that a hospital district could not engage legally in activities other than those specified in the constitution (i.e., maintaining hospital facilities and providing hospital services). The opinion stated that the Tarrant County Hospital District could not legally assume some functions of the city and county health departments. Since hospital districts are not permitted to engage even in some public health matters, it seems clear that matters of commerce and industrial development are also forbidden activities.

The deeply rooted principle of Texas law that counties are strictly accountable for the use of public monies and that such funds are not to be used, except in extremely rare instances, for the purpose of promoting economic and commercial development is discussed in Attorney General Opinion M-936 (1971). In stating that the Bexar County Commissioners Court could not make a grant to the Industrial Development Commission of Metropolitan Bexar County, a non-profit corporation, for the purpose of promoting industrial development in Bexar County, the Attorney General reasoned that the commissioners court is a court of limited jurisdiction and has only such powers as are confirmed upon it by the statutes and Constitution of Texas. The statute specifically applicable to Bexar County, art. 2352d, § 1, Texas Revised Civil Statutes authorizes the commissioners court to spend money for the purpose of advertising and promoting development and growth but forbids such expenditure until it is approved by a majority vote of the qualifying taxpaying voters of the county. To apply this reasoning

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to the question at issue, use of county funds for the purpose of promoting economic development would appear to be permitted in Texas only when specifically authorized by the legislature and approved by the taxpaying voters of the county in question. As provided by the Texas Constitution, a county may not become a member of a private corporation or make appropriations to the same. Art XI § 3. Furthermore, Article III § 52 prohibits the legislature from authorizing such a practice.

More recently and more specifically, Attorney General Opinion H-397 (1974) found that a county may not become a dues paying member of a chamber of commerce which is a corporation. The Attorney General relied upon Article III § 52 and Article XI § 3 in reaching his conclusion. It seems to make no difference whether the corporation to which donations are requested is one purely for economic and business benefit or has a charitable purpose. Attorney General Opinion JM-1199 (1990) concerned an attempt by private corporations to secure county donations in support of local livestock shows which included exhibits, programs, food, booths and carnivals for children. Notwithstanding the charitable or semi-charitable purpose, the opinion of the Attorney General was the same. Donations of money, property or services to non-profit corporations conducting local festivals would be violations of Texas law.

Although earlier Attorney General Opinions 0-2629 and 0-5563 made it clear that charitable organizations were not proper donees for county funds, Attorney General Opinion JM-1257 (1990) clarified somewhat the entire area of county appropriations to private organizations by specifically finding that a chamber of commerce is not a "charitable organization" in accordance with the definition in Texas Civil Practice and Remedies Code § 83.003. The purposes of a chamber of commerce are not the purposes of a "charitable organization" as they do not provide tangible assistance to specific individuals in the present.

As far as reimbursing the chief executive officer of the hospital district for membership in the various organizations is concerned, it seems clear that reimbursements can only be made if the expenditures are found to be in the public interest or for a public purpose and are permissible even if they incidently benefit a private individual. In the past, the attorney general approved the University of Texas School of Law's donation to the Texas Law School Foundation, a Texas non-profit corporation, of rent free space in exchange for services. Attorney General Opinion MW-373 (1981). Also approved was the operation of a faculty club at Texas A&M. Attorney General Opinion JM-1146 (1980). Attorney General Opinion JM-879 (1988) addressed expenditures by a member of a commissioners court and reimbursement for those expenses when

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attending public functions. In that opinion, it was found that the determination of whether or not it was for a public purpose must be handled on a case-by-case basis with the inquiry determining whether the activity has a reasonable relationship to the county's business. Such determination was a matter for the commissioners court. In the case at issue, the Dallas County Hospital District Board of Managers has determined that reimbursements of the expenditures for the chief executive officer for certain memberships are in the best interest of the hospital district and accomplish a legitimate public purpose of that district. The hospital district's position is that such a determination by the board of managers is subject only to judicial review.

Although a hospital district may be of the opinion that some activity may further its purpose, Texas law does not place such authority in the district. Attorney General Opinion H-31 (1973) made it clear that a hospital district cannot engage in activities other than those specified in the constitution (i.e. maintaining hospital facilities and providing hospital services). Since that opinion indicated that hospital districts cannot engage legally even in some matters of public health, it appears obvious that those districts do not have the authority to participate in matters of commerce.

In Attorney General Opinion JM-65 (1983), it was found that a county does not have unbridled authority with respect to indigents or public health. A county may contract with a private corporation only for services it is authorized by the constitution and statutes to provide. Without such authority, the expenditure is a donation in violation of the constitution. Even where an expenditure is authorized, the county must receive adequate consideration such as a benefit serving a public purpose or a service the county has a duty to provide.

One final decision which may provide insight into this question is Brazos River Authority v. Carr, 405 S.W.2d 689 (Tex. 1966). In Carr, the Brazos River authority agreed to convey its bonds to a private corporation's stockholders in return for water facilities, equipment and capital stock of the corporation. The corporation's note and mortgage were to be canceled, and the corporation was to be dissolved. The issue was whether or not this transaction violated the constitutional provisions against pledging credit, granting public money for payment of private debt and becoming a stockholder in a private corporation. The decision held that these provisions were not violated. One interpretation of this decision is that the Texas Supreme Court overlooked the technicality of a political subdivision being a stockholder in a private corporation by approving the transaction. A careful analysis of Carr, however, indicates that it can be distinguished

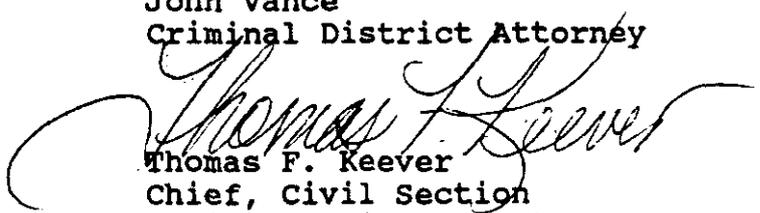
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from the subject of this opinion request. In Carr, the private corporation was to be dissolved and the county was to receive substantial tangible assets from the transaction. Dallas County Hospital District, on the other hand, intends to join ongoing corporations and may receive only intangible consideration with no guaranteed results and no contributions to a constitutionally approved county purpose.

In conclusion, the greater weight of authority indicates that there is neither express nor implied authority nor intent in our Constitution, statutes, cases and Attorney General Opinions for a county or a subdivision of the state to pay membership fees or dues or to become a member of any corporation or association whatsoever and this office requests your opinion on the matter.

Respectfully submitted,

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